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**Swiatek Painting, Inc. and International Brotherhood of Painters and Allied Trades, Local 65.**  
Case 3-CA-19533

March 22, 1996

**DECISION AND ORDER**

BY CHAIRMAN GOULD AND MEMBERS BROWNING  
AND FOX

Upon a charge and amended charge filed by the Union on August 2 and October 17, 1995, the General Counsel of the National Labor Relations Board issued a complaint on October 31, 1995, against Swiatek Painting, Inc., the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act. Although properly served copies of the charge, amended charge, and complaint, the Respondent failed to file an answer.

On February 20, 1996, the General Counsel filed a Motion for Summary Judgment with the Board. On February 21, 1996, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

**Ruling on Motion for Summary Judgment**

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, by letter dated February 2, 1996, notified the Respondent that unless an answer were received by February 9, 1996, a Motion for Summary Judgment would be filed.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

**FINDINGS OF FACT**

**I. JURISDICTION**

At all material times the Respondent, a corporation, with an office and place of business in Buffalo, New York, has been engaged as a commercial painting contractor. During the 12-month period ending March 31, 1995, Respondent, in conducting its operations, derived gross annual revenues totaling at least \$40,000 for national defense work performed at the United States Air Force Base located in Niagara Falls, New York, and purchased and received at its Buffalo, New York facility products, goods, and materials valued in excess of \$5000 directly from points outside the State of New York. As a result of the foregoing, the Respondent's operations exert a substantial impact on the national defense. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

**II. ALLEGED UNFAIR LABOR PRACTICES**

The following employees of the Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees described in Article II of the Association Agreement.

At all material times Painting Contractors of Niagara Falls, New York, the Association, has been an organization composed of various employers engaged in the construction industry, one purpose of which is to represent its employer-members in negotiating and administering collective-bargaining agreements with the Union. About June 1, 1992, the Association and the Union entered into a collective-bargaining agreement effective from June 1, 1992, to May 31, 1994 (the 1992-1994 association agreement). Thereafter, about June 1, 1994, the Association and the Union entered into a collective-bargaining agreement effective from June 1, 1994, to May 31, 1996 (the 1994-1996 association agreement).

About August 11, 1993, and June 1, 1994, the Respondent, an employer engaged in the building and construction industry, adopted and agreed to be bound by the terms of the 1992-1994 and 1994-1996 association agreements, and thereby recognized the Union as the exclusive collective-bargaining representative of the unit. Since about August 11, 1993, the Respondent has so recognized the Union without regard to whether the majority status of the Union had ever been established under Section 9(a) of the Act. For the period

from August 11, 1993, to May 31, 1994, and from June 1, 1994, to May 31, 1996, based on Section 9(a) of the Act, the Union has been the limited exclusive collective-bargaining representative of the unit.

About July 20, 1995, the Respondent ceased doing business and closed its operations. The Respondent engaged in this conduct without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent regarding the effects of the conduct on unit employees.

#### CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has been failing and refusing to bargain collectively with the limited exclusive bargaining representative of the unit employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

To remedy the Respondent's unlawful failure to give the Union prior notice and an opportunity to bargain over the effects of the decision to close its facility on unit employees, we shall order it to bargain with the Union, on request, over the effects of that decision. To ensure that meaningful bargaining occurs and to effectuate the policies of the Act, we shall accompany our order with a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violations and to re-create in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so by ordering the Respondent pay backpay to the terminated employees in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

Thus, the Respondent shall pay its terminated employees backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the closing of its facility on its employees; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 days of the date of this Decision and Order, or to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Union; (4) the Union's subsequent failure to bargain in good faith; but in no event shall the sum paid to these employees exceed the amount

they would have earned as wages from the date on which the Respondent terminated its operations, to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner; provided, however, that in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Backpay shall be based on earnings that the terminated employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Finally, in view of the fact that the Respondent's facility is currently closed, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of its former employees in order to inform them of the outcome of this proceeding.

#### ORDER

The National Labor Relations Board orders that the Respondent, Swiatek Painting, Inc., Buffalo, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to give International Brotherhood of Painters and Allied Trades, Local 65, prior notice or an opportunity to bargain about the effects on the unit employees of its decision to cease business and close its operations.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively with the Union regarding the effects on the unit employees of its decision to cease doing business and to close its operations, and reduce to writing any agreement reached as a result of such bargaining.

(b) Pay the unit employees their normal wages, with interest, for the period set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Mail signed and dated copies the attached notice marked "Appendix"<sup>1</sup> to the Union, and to all employ-

<sup>1</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a

ees who were employed by it as of the date of closure. Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be mailed immediately upon receipt.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. March 22, 1996

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William B. Gould IV, Chairman

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Margaret A. Browning, Member

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Sarah M. Fox, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to mail and abide by this notice.

WE WILL NOT fail or refuse to give International Brotherhood of Painters and Allied Trades, Local 65, prior notice or an opportunity to bargain about the effects on the unit employees of our decision to cease business and close our operations. The unit includes all employees described in article II of the 1994-1996 association agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain collectively with the Union regarding the effects on the unit employees of our decision to cease doing business and close our operations, and reduce to writing any agreement reached as a result of such bargaining.

WE WILL pay the unit employees their normal wages, with interest, for the period set forth in the decision of the National Labor Relations Board.

SWIATEK PAINTING, INC.